86-1220

No. 86-

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

DELAWARE AND HUDSON RAILWAY COMPANY,
Petitioner,

v.

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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January 26, 1987

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QUESTION PRESENTED

Whether the Norris-LaGuardia Act, 29 U.S.C. § 101 *et seq.*, deprives the federal courts of jurisdiction to enjoin secondary picketing to shut down the entire railroad system nationwide over a contract dispute with a single railroad, in violation of the Railway Labor Act, 45 U.S.C. § 151 *set seq.*

LIST OF PARTIES

The parties to the proceedings below were the petitioner, Delaware and Hudson Railway Company; the respondent, Brotherhood of Maintenance of Way Employes; and Guildford Transportation Industries, Inc.

Petitioner Delaware and Hudson Railway Company is a wholly-owned subsidiary of Guilford Transportation Industries, Inc., a private holding company. The Delaware and Hudson's subsidiaries and affiliates, apart from wholly-owned subsidiaries, are:

Albany Port Railroad Corporation
Albany and Vermont Railway Company
Boston and Maine Corporation
Boston Lights, Inc.
Cheshire Bridge Corporation
Delaware River Estates, Inc.
Eastern Lights, Inc.
Greenwich and Johnsonville Railway Company
Guilford Aviation Corporation
Guilford Motor Express, Inc.
Hudson River Estates, Inc.
Kennebec River Estates, Inc.
Maine Central Railroad Company
Merrimack River Estates, Inc.
Naperville Junction Railway Company
Northern Lights, Inc.
Northern Railroad
Pine Tree Corporation
Portland Lights, Inc.
Portland Terminal Company
Railstar Control Technology, Inc.
Saratoga and Schenectady Railroad Company
Springfield Terminal Railway Company
Stony Brook Railroad Corporation
Two Rivers, Inc.
Vermont and Massachusetts Railroad Company
Wilkes-Barre Connecting Railroad Company

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IN THE

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No. 86-

DELAWARE AND HUDSON RAILWAY COMPANY,
Petitioner,

v.

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner Delaware and Hudson Railway Company respectfully requests that the Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 803 F.2d 1228 (1st Cir. 1986) and is reproduced at App. 1a-16a. The opinion of the District Court denying petitioner's motion for a preliminary injunction is unreported; it is reproduced at App. 17a-19a.

JURISDICTION

The judgment of the Court of Appeals was entered on October 28, 1986 (App. 1a). The jurisdiction of this Court to review the judgment of the Court of Appeals is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutes principally involved in this case are the Railway Labor Act, 45 U.S.C. § 151 *et seq.*, and the Norris-LaGuardia Act, 29 U.S.C. § 101 *et seq.* The most relevant provisions of those statutes are reproduced in the Appendix to this petition, at App. 20a. Those statutes must be interpreted with reference to other statutes, including section 8(b)(4) of the National Labor Relations Act, 29 U.S.C. § 158(b)(4), and section 11101(a) of the Interstate Commerce Act, 49 U.S.C. § 11101(a), which are also reproduced in the Appendix, at App. 29a.

STATEMENT

A. The Events in This Case

1. *The labor dispute.* Respondent, the Brotherhood of Maintenance of Way Employes ("BMWE"), represents the craft of maintenance of way employees on the Maine Central Railroad and its wholly-owned subsidiary, the Portland Terminal Company (collectively, "Maine Central").[1] On April 2, 1984, the BMWE served the Maine Central with notices under section 6 of the Railway Labor Act, 45 U.S.C. § 156, proposing changes in their collective bargaining agreement. Thereafter, the Maine Central and the BMWE went through the various "major dispute" procedures prescribed by the Railway Labor Act, but they did not settle their contract dispute. On March 3, 1986, the BMWE commenced a strike against the Maine Central, which responded, as it could under *Brotherhood of Railway & Steamship Clerks* v. *Florida East Coast R.R.*, 384 U.S. 238 (1966), by attempting to continue operations in spite of the strike by using supervisory personnel and replacements. See 803 F.2d at 1229 (App. 3a).

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[1] The Maine Central was not a party in the Court of Appeals and is not involved in this petition for certiorari.

2. *The secondary picketing.* When the Maine Central would not give in to its demands, the BMWE extended its picketing to other railroads. The BMWE thereby sought to increase the pressure on the Maine Central by inducing the other railroads to stop handling freight cars also handled by the Maine Central, even though those other carriers are obligated, under the Interstate Commerce Act, to handle such traffic.[2] The BMWE initially extended its picketing to the Boston and Maine Railroad which, like the Maine Central, is owned by Guilford Transportation Industries, Inc., and which interconnects with the Maine Central. (App. 3a-4a). Later, on March 17, 1986, the BMWE extended its picketing to petitioner, the Delaware and Hudson Railway Company ("D&H"), even though the D&H does not interchange with the Maine Central.[3] When that failed to force the

---

[2] The union's intention was to "shut down the nation's railroad system, dry up the Guilford lines' source of traffic, and put pressure on Guilford to require Maine Central to cave in to the Union's requirements." *Burlington Northern R.R.* v. *BMWE*, 793 F.2d 795, 798 (7th Cir. 1986), *cert. granted*, 55 U.S.L.W. 3231 (Oct. 6, 1986) (No. 86-39).

[3] The D&H and the Maine Central both are wholly-owned by Guilford Transportation, a holding company. Labor relations on each carrier are handled separately, however, and it is clear that, under the Railway Labor Act, the D&H and the Maine Central are separate carriers, since they operate separately, maintain separate payrolls and seniority rosters, and maintain separate records for purposes of I.C.C. reporting and records requirements. See First Annual Report, National Mediation Board 22 (1935); *New York Cent. R.R.*, 1 N.M.B. 197 (1941), *aff'd sub nom. Switchmen's Union* v. *NMB*, 135 F.2d 785 (D.C. Cir.), *rev'd on other grounds*, 320 U.S. 297 (1943); *Seaboard System Railroad*, 11 N.M.B. 217, 224-25 (1984). The D&H presented undisputed evidence to the District Court that it meets all of these recognized standards for separate carrier status. (See J.A. 20-21.) Both the District Court and the Court of Appeals assumed for purposes of their decisions that the corporate affiliation of the D&H with the Maine Central, on account of their common ownership by Guilford Transportation, was immaterial. See 803 F.2d 1229 n.5 (App. 4a).

Maine Central to accede to its demands, the BMWE began picketing additional railroads and threatened to picket every railroad in the country, extending as far west as Los Angeles.[4] "While the striking workers had no direct dispute with these railroads, they sought to pressure them to cease doing business with their employers." *Central Vermont Ry.* v. *BMWE*, 793 F.2d 1298, 1299 (D.C. Cir. 1986). These "secondary" railroads, including the D&H, responded by filing separate federal court suits to enjoin the BMWE's secondary picketing.

B. The Other Secondary Picketing Cases

After two District Courts granted injunctions against the BMWE's secondary picketing and others denied such injunctions, the Courts of Appeals for the Second, Fourth, Seventh, and District of Columbia Circuits held that the federal courts lack jurisdiction to enjoin the BMWE from engaging in secondary picketing of railroads not involved in the basic Maine Central/BMWE dispute. On October 6, 1986, this Court granted a writ of certiorari to review the decision of the Seventh Circuit, in *Burlington Northern R.R.* v. *BMWE*, 793 F.2d 795 (7th Cir. 1986), *cert. granted*, 55 U.S.L.W. 3231 (Oct. 6, 1986) (No. 86-39), and petitions for certiorari are pending in three of the other secondary picketing cases.[5]

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[4] See *Burlington Northern R.R.* v. *BMWE*, *supra*, 793 F.2d at 797.

[5] Those cases are: *Consolidated Rail Corp.* v. *BMWE*, No. 86-7289 (2d Cir., June 5, 1986), cert. petition filed Sept. 2, 1986 (No. 86-353); *Richmond, Fredericksburg & Potomac R.R.* v. *BMWE*, 795 F.2d 1161 (4th Cir. 1986), cert. petition filed Sept. 26, 1986 (No. 86-503); and *Norfolk & Western Ry.* v. *BMWE*, No. 86-3555 (4th Cir., July 11, 1986), cert. petition filed Aug. 1, 1986 (No. 86-175). No petition for certiorari has been filed to review the D.C. Circuit's decision in *Central Vermont Ry.* v. *BMWE*, 793 F.2d 1298 (D.C. Cir. 1986).

C. The Decisions Below

1. *The District Court.* The D&H sought a temporary restraining order on March 27, 1986, from the United States District Court for the District of Maine (Carter, J.), to restrain the BMWE from picketing its premises or encouraging or engaging in any strikes or work stoppages against the D&H. With the parties' consent, the District Court treated the D&H motion as one for a preliminary injunction, and on April 2, 1986, issued an opinion and order denying that motion on the ground that the Norris-LaGuardia Act deprived the court of jurisdiction to enjoin such picketing. (App. 17a.) The court stated that, "[a]fter *Jacksonville Bulk Terminals* [v. *ILA*, 457 U.S. 702, 713 (1982)], it appears that all that is required for protections of the Norris-LaGuardia Act to apply is that there be a labor dispute and that the union continue to act as a labor organization." (App. 18a.) The Court found these requirements satisfied in this case. "It is clear that a labor dispute between the [BMWE] and the Maine Central underlies the picketing sought to be enjoined here, and there is no doubt in the Court's mind that the Union is acting as a labor organization trying to force resolution of that dispute by picketing D&H." (*Id.*) Accordingly, the Court held that it lacked jurisdiction, and stated that "[w]hether secondary picketing is to be prohibited in certain circumstances under the Railway Labor Act is a question of legislative policy, properly left to Congress." (*Id.* 19a.)

2. *The Court of Appeals.* The Court of Appeals affirmed the District Court's holding that it lacked jurisdiction, because of the Norris-LaGuardia Act, to enjoin the secondary picketing by the BMWE. 803 F.2d at 1229 (App. 3a). In so holding, the Court of Appeals expressly followed the decisions of the Courts of Appeals in *Burlington Northern R.R.* v. *BMWE*, *supra*; *Central Vermont Ry.* v. *BMWE*, *supra*; and *Richmond, Fred-*

ericksburg & Potomac R.R. v. *BMWE, supra.* See 803 F.2d at 1228-29 (App. 2a-3a). At the same time, the court recognized that its decision conflicted with those of the Courts of Appeals for the Eighth and Fifth Circuits, respectively, in *Ashley, Drew & Northern Ry.* v. *UTU*, 625 F.2d 1357 (8th Cir. 1980), and *Brotherhood of Railroad Trainmen* v. *Atlantic Coast Line R.R.*, 362 F.2d 649 (5th Cir.), *aff'd by an equally divided Court*, 385 U.S. 20 (1966). 803 F.2d at 1229 (App. 2a-3a).

The Court of Appeals noted that the D&H argued that "it would be illogical to conclude that Congress, in enacting the legislation here in question, intended to permit a relatively small labor dispute in Maine to disrupt railroad transportation activities in other parts of the nation." 803 F.2d at 1230 (App. 5a). But the Court of Appeals rejected that argument, based on its reading of the legislative history of the Railway Labor Act, which it found to contain no "expressed or implied indication that Congress intended to prohibit the use of secondary activities by a labor organization once the procedures established by the RLA had been exhausted between the union and the carrier with whom negotiations were taking place." *Id.* at 1231 (App. 8a). Accordingly, the Court rejected the D&H's argument that Congress never intended to permit such secondary activity. The Court of Appeals also rejected the D&H's argument that the secondary picketing here involved violated the Interstate Commerce Act, 49 U.S.C. § 11101(a), and in so doing the court again relied on the Seventh Circuit's decision in *Burlington Northern* v. *BMWE, supra.* See 803 F.2d at 1235 (App. 15a-16a).

REASONS FOR GRANTING THE WRIT

1. This case plainly warrants review by this Court, since it involves the identical issues presented in No. 86-39, *Burlington Northern* v. *BMWE, supra,* as to which

this Court already has granted certiorari.[6] Indeed, the First Circuit in this case relied to a large extent on the Seventh Circuit's decision in *Burlington Northern*. Thus, certiorari should be granted in this case for the same reasons that it was granted in *Burlington Northern*. Rather than repeat those reasons at length, we respectfully refer the Court to the petition for a writ of certiorari in *Burlington Northern*, and we also make the following brief points.

2. This case, like the *Burlington Northern* case, presents the most important railway labor issue before the courts today. The decision below, like the similar decisions of the Second, Fourth, Seventh, and District of Columbia Circuits, means that a union having a dispute with a small railroad anywhere in the country may spread its dispute across the land and cause a nationwide rail shutdown which cannot be restrained under any circumstances by the federal courts. Thus, like *Burlington Northern*, this case plainly raises issues of substantial importance to the Nation.

3. The decision of the Court of Appeals is an incorrect construction of the pattern of federal labor legislation embodied in the Railway Labor and Norris-LaGuardia Acts, and does violence to the intent of the Congresses that passed those Acts. The picketing of railroads not parties to a Railway Labor Act dispute violates the purposes and policies of the Railway Labor Act in several respects. The Act was designed to avoid interruptions to commerce or the operations of any carriers. To that end, the Act provides a comprehensive framework for the resolution of "all" railway labor disputes. Within that

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[6] The three other petitions for certiorari arising out of the similar decisions of the Courts of Appeals for the Second and Fourth Circuits, which were filed in August and September 1986, have not been acted upon pending this Court's disposition of the *Burlington Northern* case.

universe, what the Act does not allow it prohibits. The Act lets the parties resort to self-help after exhausting its mandated procedures, but the statute provides machinery only for the resolution of disputes between a rail employer and *its* employees (or their representative) over those employees' "rates of pay, rules, or working conditions," and makes no allowance for demands on other railroads to cease handling a struck carrier's goods. Indeed, such a demand is unlawful under both the Interstate Commerce Act, which prohibits the secondary carrier from acceding to such a demand, and the Railway Labor Act, which enjoins unions to use "reasonable efforts" to settle disputes, which does not include demands on carriers to engage in unlawful action. Yet the BMWE claims a right to picket the D&H with impunity and without any prior negotiation, even though it could not resort to more limited self-help against the primary disputant without first exhausting the purposely long and drawn out procedures of the Act. Congress intended nothing of the kind.

Moreover, the Congress that passed the Norris-LaGuardia Act specifically considered the effect it would have on the railway labor situation, and assurances were given by the sponsors, including Mr. LaGuardia himself, that the federal courts would not be powerless under the proposed legislation to stop a widespread railroad shutdown. Indeed, nothing would have startled that Congress more than the Court of Appeals' decision, which makes the Norris-LaGuardia Act a vehicle for the escalation of local contract disputes into national emergencies.

Consistent with the clear intent of the Congress that passed the Norris-LaGuardia Act, this Court has uniformly held that the Norris-LaGuardia Act should not be applied literally but rather must be "accommodated" to other federal labor laws—especially the Railway Labor Act—to enforce the purposes and policies of each. See,

e.g., Brotherhood of Railroad Trainmen v. *Chicago River & Ind. R.R.*, 353 U.S. 30 (1957). The need for accommodation is particularly compelling here, where the consequences of the Court of Appeals' ruling—a widespread disruption of essential rail service—is exactly what Congress sought to prevent. An injunction against such secondary activity not only is permissible, but was fully contemplated by the framers of the Norris-LaGuardia Act. Thus, the Norris-LaGuardia Act must yield to the important federal policy, embodied in the Railway Labor Act, against the interruption of essential transportation service on account of picketing in violation of that Act.

4. Finally, certiorari should be granted in this case because the Court of Appeals' holding is the subject of a conflict among the Circuits. In the specific context of secondary picketing of railroads, the lower federal courts (including the Courts of Appeals for the Fifth and Eighth Circuits) had consistently held, until the instant Maine Central/BMWE controversy, that the Norris-LaGuardia Act is inapplicable when a union pickets or strikes a "neutral" railroad not a party to the railway labor dispute in question. See, *e.g., Ashley, Drew & Northern Ry.* v. *UTU*, *supra* (and cases cited therein); *Brotherhood of Railroad Trainmen* v. *Atlantic Coast Line R.R.*, *supra*. Under these decisions, a suit to enjoin secondary picketing is not one "involving or growing out of a labor dispute," within the meaning of the Norris-LaGuardia Act, if the picketed railroad has no involvement in the underlying labor dispute. A railroad not directly party to the labor dispute in question is entitled to equitable relief against such picketing unless it has made itself vulnerable to self-help by the union by intervening in the primary dispute in some way. Such action by an otherwise neutral railroad in giving assistance to a struck railroad—thereby forfeiting its neutrality—has been termed "substantial alignment." But, under these decisions, unless an otherwise neutral railroad has "substantially aligned" itself with the railroad that has a Rail-

way Labor Act dispute with the union, the injunction suit is not covered by Norris-LaGuardia, and an injunction may issue. The decision of the First Circuit in this case, like the similar decisions of the Second, Fourth, Seventh, and District of Columbia Circuits, directly conflicts with the decisions of the Fifth and Eighth Circuits.

5. For all these reasons, we urge this Court to grant certiorari and to reverse the recent decisions of the Courts of Appeals and restore the correct interpretation of the pattern of labor legislation contained in the Railway Labor and Norris-LaGuardia Acts. Alternatively, we respectfully suggest that it would be appropriate to keep this petition on the docket pending the Court's decision in No. 86-39, the *Burlington Northern* case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 26, 1987

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FIRST CIRCUIT

No. 86-1366

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES,
Plaintiff, Appellee,

v.

GUILFORD TRANSPORTATION INDUSTRIES, INC., ET AL.,
Defendants, Appellees.

Appeal of Delaware and Hudson Railway Company
Defendant, Appellant

Argued Sept. 5, 1986
Decided Oct. 28, 1986

Richard T. Conway, with whom Shea & Gardner, Ralph J. Moore, Jr., William F. Sheehan, Nancy J. Bregstein, D. Eugenia Langan, and Kinga M. LaChapelle, Washington, D.C., were on brief for appellant.

John O'B. Clarke, Jr., with whom Highsaw & Mahoney, P.C., Washington, D.C., Craig J. Rancourt, Law Office of Craig J. Rancourt, Biddeford, Me., and Louis P. Malone, III, Gen. Counsel, Washington, D.C., were on brief for appellee Broth. of Maintenance of Way Employees.

Before CAMPBELL, Chief Judge, BOWNES and TORRUELLA, Circuit Judges.

TORRUELLA, Circuit Judge.

The principal issue presented by this appeal is whether the Railway Labor Act, 45 U.S.C. § 151 *et. seq.* (RLA), overrides the provisions of the Norris-LaGuardia Act, 29 U.S.C. § 101 *et seq.*, to the extent of permitting the enjoining of secondary picketing by a labor organization that has exhausted the procedures established by the RLA for resolution of a "major" dispute [1] with a primary carrier-employer.[2] Although this is a question of first impression in this circuit, we are the fortunate beneficiaries of prior consideration of this query by several of the courts of appeal. *See Burlington Northern R. Co. v. B.M.W.E.*, 793 F.2d 795 (7th Cir.1986) (cannot enjoin secondary boycott); *Central Vermont Ry. v. Broth. of Maintenance*, 793 F.2d 1298 (D.C.Cir.1986) (cannot enjoin secondary picketing); *Richmond, Fredericksburg and Potomac R.R. Co. v. B.M.W.E.*, 795 F.2d 1161 (4th Cir., 1986) (same). *But see, Ashley, Drew and Northern Ry. v. UTU*, 625 F.2d 1357 (8th Cir.1980) (secondary picketing may be enjoined when the interests of the party being picketed are not "substantially aligned" with those of the struck employer); *Brotherhood of Railroad Trainmen v. Atlantic Coast Line R.R.*, 362 F.2d 649 (5th Cir.

[1] In RLA parlance a "major" dispute arises from the formation or negotiation of changes to agreements regarding rates of pay, rules, or working conditions. *See Elgin, J. & E. Ry. v. Burtey*, 325 U.S. 711, 722-28, 65 S.Ct. 1282, 1289-92, 89 L.Ed. 1886 (1945); 45 U.S.C. §§ 155-160. A "minor" dispute is concerned with the resolution of grievances and other disputes concerning the interpretation or application of existing collective bargaining agreements. *Brotherhood of Railroad Trainmen v. Chicago River & Ind. R.R.*, 353 U.S. 30, 77 S.Ct. 635, 1 L.Ed.2d 622 (1957), 45 U.S.C. § 153.

[2] We are not deciding whether secondary activity is enjoinable prior to exhaustion of RLA dispute resolution procedures with the primary carrier employer.

1966) (same). *Cf. Consolidated Rail Corp. v. Broth. of Maintenance*, 792 F.2d 303 (2d Cir.1986) (no need to exhaust RLA remedies before picketing secondary employer).

We affirm, on jurisdictional grounds, the district court's refusal to enjoin such conduct. 29 U.S.C. § 101.

I

The appellee in this case, the Brotherhood of Maintenance of Way Employees (BMWE), is a labor organization representing a bargaining unit of maintenance of way employees of the Maine Central Railroad and its wholly-owned subsidiary, the Portland Terminal Company (referred collectively hereafter as the Maine Central). Since April, 1984, BMWE and Maine Central have been engaged in the negotiation of changes to their collective bargaining agreement, but have reached no agreement. The parties exhausted the RLA procedures for "major" dispute resolution [3] and thereafter, on March 3, 1986, the BMWE commenced a strike against the primary carrier-employer, Maine Central. Maine Central attempted to continue operating with supervisory personnel and replacements,[4] which in turn led to the escalation of hostilities by the BMWE. The union extended its picketing to other carriers not directly involved in the dispute with Maine Central. The object of this secondary picketing was to indirectly pressure Maine Central to give in to the BMWE's bargaining demands.

The pickets were initially extended to the Boston & Maine Railroad (B & M), which, like the Maine Central, is owned by Guilford Transportation Industries, Inc.

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[3] 45 U.S.C. §§ 155-160. *See Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 378, 89 S.Ct. 1109, 1115, 22 L.Ed.2d 344 (1969).

[4] *See Brotherhood of Railway & Steamship Clerks v. Florida East Coast R.R.*, 384 U.S. 238, 86 S.Ct. 1420, 16 L.Ed.2d 501 (1966).

(Guilford), a holding company. B & M interconnects with the Maine Central. Thereafter BMWE also picketed Delaware and Hudson Railway Company (D & H), another Guilford subsidiary, which however is non-connecting.[5] Additional non-affiliated and non-connecting railroads were picketed by BMWE, also with the object of exerting pressure on Maine Central.

Various suits were commenced throughout the country by the several secondary carriers in an attempt to stop the BMWE's secondary picketing. All of these suits, despite some initial successes in the district courts, were ultimately unsuccessful. The courts of appeal held that the secondary picketing was not prohibited by the RLA and could not be enjoined because of the Norris-LaGuardia Act. *See Burlington Northern R. Co., supra; Central Vermont Ry., supra; Richmond, Fredericksburg and Potomac R.R. Co., supra.*

In the meantime, in an apparent attempt to forestall action by the carriers elsewhere, the BMWE filed a declatory judgment suit in the U.S. District Court in Maine against Guilford, B & M, and D & H, seeking, among other things, a declaration to the effect that its secondary picketing of B & M and D & H was protected activity under the Constitution and the RLA. The carrier-defendants counterclaimed and sought injunctive relief to prohibit the secondary activity.

The district court, after hearing D & H's motion for preliminary injunction, ruled that all that was required for the Norris-LaGuardia Act to apply was that there be a labor dispute and that the union continue to act as a

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[5] Appellee Guilford in its brief raises questions regarding the right to picket these affiliates because of its dispute with Maine Central. We need not enter this quagmire as the district court's decision is not based on the corporate affiliation of appellants to Maine Central, but rather assumes *arguendo* its immateriality. We shall do likewise.

labor organization. Finding that both conditions existed in this case, the court in effect concluded that it was immaterial whether or not the interests of D & H and Maine Central were "substantially aligned." [6] Injunctive relief was denied and this appeal ensued.

II

In 1881 Oliver Wendell Holmes, in his now famous essay, stated that "[t]he life of the law has not been logic; it has been experience." [7] The present situation is a case in point, as much of appellant's argument is based on its perception that it would be illogical to conclude that Congress, in enacting the legislation here in question, intended to permit a relatively small labor dispute in Maine to disrupt railroad transportation activities in other parts of the nation. What Congress may or may not have done is explainable less in terms of logic, than by recounting how this legislation developed. Thus, the issue presented by this case cannot be answered, and the answer cannot be properly supported, without consideration of the events leading up to the passage of the RLA, and subsequent legislation.[8]

At common law, all strikes and pickets, whether primary or secondary, were considered illegal combinations or conspiracies. In the early 18th century most of this activity was subjected to criminal sanctions,[9] an attitude

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[6] *See Ashley, Drew and Northern Ry., supra; Brotherhood of Railroad Trainmen, supra.*

[7] Holmes, *The Common Law*, p. 1 (Howe, ed., 1963).

[8] *See generally* Cox, Bok and Gorman, *Labor Law*, 9th ed. (1981); Note, *Accommodation of the Norris-LaGuardia Act to Other Federal Statutes*, 72 Harv.L.Rev. 354 (1958); Gregory, *Labor and the Law*, 2d ed. (1958); Frankfurter & Greene, *The Labor Injunction* (1930).

[9] *See, e.g., Commonwealth v. Pullis*, Philadelphia Mayor's Ct., 1806.

that prevailed until *Commonwealth v. Hunt*[10] ruled that collective labor activity was not a criminal conspiracy. Thereafter, the civil injunction became the principal weapon by which strikes and picketing were suppressed. In issuing injunctive relief against these concerted activities, courts relied on common law principles of nuisance, trespass and interference with advantageous relationships.[11]

Two views soon emerged, both of which were represented in the leading Massachusetts case of *Vegelahn v. Gunter*.[12] In this case the majority held that peaceful picketing to obtain higher wages was an unlawful means of securing a lawful objective. Judge Holmes dissented, arguing that if the object of the activity was lawful, any non-violent means was lawful, even against "third persons." In this stage of development of the law of striking and picketing, no distinction appears to have been drawn between primary and secondary activity.[13]

In 1908, the Supreme Court decided the *Danbury Hatters* case,[14] specifically ruling that both primary and secondary boycotts were actionable in damages pursuant to Section 7 of the Sherman Act.[15] Thereafter the use of the federal courts to enjoin labor disputes became even more prevalent and led to the passage of the Clayton Act in 1914.[16]

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[10] 45 Mass. (4 Met.) 111 (1842).

[11] *See In re Debs*, 158 U.S. 564, 15 S.Ct. 900, 39 L.Ed. 1092 (1895).

[12] 167 Mass. 92 (1896).

[13] *See Plant v. Woods*, 176 Mass. 492 (1900), (Holmes, J. dissenting).

[14] *Loewe v. Lawlor*, 208 U.S. 274, 28 S.Ct. 301, 52 L.Ed. 488 (1908).

[15] July 2, 1890, c. 647, 26 Stat. 209.

[16] 15 U.S.C. §§ 12 *et seq.*

In enacting Section 20 of the Clayton Act,[17] Congress attempted to narrow the jurisdiction of the federal courts by prohibiting injunctions in disputes concerning terms and conditions of employment. Purportedly, the only exception was equitable relief necessary to prevent irreparable injury to property or to a property right. The Supreme Court, however, in *Duplex Printing Press Co. v. Deering*,[18] narrowed Section 20's prohibition on injunctions to disputes between parties in the proximate relation of employer and employee and not to secondary boycotts. Thus secondary activity was held to be enjoinable even after Section 20 was enacted.

Against this background Congress passed the RLA in 1926.[19] Although limited at that time to the railroad industry,[20] the RLA was the first major Congressional recognition of employees' right to organize and to negotiate with employers. The RLA made no mention of secondary boycotts. There are, however, various indications from the text of the statute that the rights and procedures established thereunder were only intended to regulate the relationships between carriers and *their* employees. For example, Section 1, Fifth of the RLA[21] defines the term "employee" as including "every person in the service of a carrier (subject to *its* continuing authority to supervise and direct the manner of rendition of his service)" (emphasis supplied). Several other sections refer to the carrier(s) and "*its* or their employees."[22]

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[17] 29 U.S.C. § 52.

[18] 254 U.S. 443, 41 S.Ct. 172, 65 L.Ed. 349 (1921).

[19] 44 Stat. 577.

[20] It was amended in 1936 to include the airline industry. *See* 45 U.S.C. §§ 181-185.

[21] 45 U.S.C. § 151, Fifth.

[22] Emphasis supplied. *E.g.*, Section 2 (45 U.S.C. § 152) (General duties of carriers and employees to settle disputes), Section 7 (45 U.S.C. § 157) (Arbitration), and Section 10 (45 U.S.C. § 160) (Emergency Board).

The use of the defined term "employee" throughout the statute strongly suggests that a classical employee-employer relationship was contemplated by Congress.[23]

In our search of the legislative history of the original RLA and its subsequent amendments,[24] we have been unable to find any expressed or implied indication that Congress intended to prohibit the use of secondary activities by a labor organization once the procedures established by the RLA had been exhausted between the union and the carrier with whom negotiations were taking place. In the face of this legislative silence, the conclusion that Congress meant to proscribe such activities can only be reached by surmise and speculation.

The statements of Congressmen Merritt and Berkeley,[25] relied upon by appellants are at best ambiguous, as is that of D.B. Robertson, President of the Brotherhood of

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[23] *E.g.*, Section 3 (45 U.S.C. § 153) (National Railroad Adjustment Board, referred to in the original act as "Boards of Adjustment"), Section 5 (45 U.S.C. § 155) (Mediation Board, Section 4 of original act), and Section 6 (45 U.S.C. § 156) (procedure in changing rates of pay, rules and working conditions). We note in passing that when the RLA was amended in 1936 to include carriers by air, 49 Stat. 1189, similar language was adopted by Congress, *e.g.*, Section 201 ("air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to *its* or their continuing authority to supervise and direct the manner of rendition of his service."). 45 U.S.C. § 181. Emphasis supplied. *See also* Sections 202 (45 U.S.C. § 182), 203 (45 U.S.C. § 183), 204 (45 U.S.C. § 184) and 205 (45 U.S.C. § 185).

[24] June 7, 1934, c. 426, 48 Stat. 926; June 21, 1934, c. 691, 48 Stat. 1185; June 25, 1936, c. 806, 49 Stat. 1922; Aug. 13, 1940, c. 664, 54 Stat. 785, 786; June 25, 1948, c. 646, 62 Stat. 991; May 24, 1949, c. 139, 63 Stat. 107.

[25] 67 Cong. Rec. 4568; 4519 (1926). "Everybody recognizes the absolute importance of the smooth and continued functioning of the railway transportation system. Everybody knows that if that system should be paralyzed even for one week . . . national calamity [would result]." (Congressman Merritt, 67 Cong. Rec. 4568 (1926)).

Locomotive Firemen & Enginemen.[26] The language referred to by appellants, presently contained in 45 U.S.C. § 151a(1), to the effect that the RLA prescribes procedures for the peaceful resolution of "*all* disputes concerning rates of pay, rules or working conditions," [27] was not in the RLA as enacted in 1926. *See* 44 Stat. 577. In any event, even as it reads today, we must take this language in the light of the definition of the term "employee" previously indicated. That definition establishes that the RLA seeks to regulate *only* the relationships and disputes arising between carriers and those persons "subject to the continuing authority [of the carrier] to supervise and direct the manner of rendition of his services," [28] *e.g.*, persons in an employer-employee relationship.

Appellants' best argument would have been that the Supreme Court's decision in *Duplex Printing* survived the RLA's passage in 1926, thus making it illegal to have a secondary boycott even after its enactment. It is apparent why appellants have not pressed this point, however.

In 1932, Congress enacted the Norris-LaGuardia Act.[29] Section 1 thereof unequivocably states:

> No court of the United States, as defined in this chapter, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this chapter, nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter.[30]

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[26] The RLA "provides a machinery to promote peace, not a manual of war." *Hearings on H.R. 7180,* 69th Cong., 1st Sess. 191 (1926).

[27] Emphasis supplied by appellants in their brief.

[28] 45 U.S.C. § 151, Fifth.

[29] 47 Stat. 70, 29 U.S.C. §§ 101-115.

[30] 29 U.S.C. § 101.

Section 2 proceeds to state that in the interpretation of this statute and "in determining the jurisdiction and authority of the courts of the United States . . . [it is] the public policy of the United States . . . that [employees] shall be free from the interference, restraint, or coercion of employees of labor . . . in [the effectuation of] concerted activities for the purpose of collective bargaining or other mutual aid or protection.[31] In labor parlance, "concerted activities," of course, includes strikes and secondary boycotts. *See Jacksonville Bulk Terminals, Inc., supra.*

The Norris-LaGuardia Act is anything but vague regarding acts that are *not* subject to the equitable jurisdiction of the courts of the United States. Section 4 specifically deprives federal courts of power to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit the following acts:

> (e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;
>
> (i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified.[32]

This is exactly the conduct that appellants seek to enjoin.

It is Section 13, however, which is most damaging to appellants' contentions. It defines the term "labor dispute" as including:

> *any controversy* concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or condi-

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[31] 29 U.S.C. § 102.

[32] 29 U.S.C. § 104(e), (i).

> tions of employment, *regardless of whether or not the disputants stand in the proximate relation of employer and employee.*[33]

This provision was specifically enacted to overrule the Supreme Court's decision in *Duplex Printing*. *See H.R. Rep. No. 669*, 72d Cong., 1st Sess. 10 (1932); *Meat Cutters Union v. Jewel Tea Co.*, 381 U.S. 676, 703, 85 S.Ct. 1596, 1610, 14 L.Ed.2d 640 (1965) (Goldberg, J., concurring); *United States v. Hutcheson*, 312 U.S. 219, 229-30, 61 S.Ct. 463, 454-65, 85 L.Ed. 788 (1941); Cox, Bok & Gorman, *Labor Law*, *supra*, at 55-60. Furthermore, it was intended by Congress that the provision be broadly interpreted. *See Corporate Printing Co., Inc. v. New York Typographical Union No. 6*, 555 F.2d 18 (2d Cir.1977). It has thus been regarded as a limitation against enjoining even controversies whose genesis is political protest, *Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Ass'n*, 457 U.S. 702, 102 S.Ct. 2672, 73 L.Ed. 2d 327 (1982) (refusal to handle ships of the U.S.S.R. in protest of invasion of Afghanistan), and to cover intra-union disputes. *See Bodecker v. Local Union No. P-46*, 640 F.2d 182 (6th Cir.1983).

More on point, however, it is unquestioned that since its enactment, this section, together with the specific language of the other conditions previously pointed out, deprived federal courts of *any* jurisdiction to enjoin secondary boycotts. *See Iron Workers v. Pauly Jail Bldg., Co.*, 118 F.2d 615, 620 (8th Cir.), *cert. denied*, 314 U.S. 639, 62 S.Ct. 75, 86 L.Ed. 513 (1941); *Wilson & Co. v. Birl*, 105 F.2d 948, 952 (3d Cir.1939); *Cf. Bakery Sales Drivers Local Union No. 33 v. Wagshal*, 333 U.S. 437, 68 S.Ct. 630, 92 L.Ed.2d 792 (1948) (where the picketing is not related to a labor dispute the activity may be enjoined). Although the decided cases on the issue of secondary boycotts do not include any carriers or labor or-

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[33] 29 U.S.C. § 113(c). Emphasis supplied.

ganizations covered by the RLA, the language of these decisions places great reliance on the all inclusive language of the Norris-LaGuardia Act prohibition. This reliance is particularly relevant when we consider that the statute was enacted to deal with a specific issue, to control the issuance of injunctions by federal courts in cases of labor disputes, rather than the broader purposes of a general labor law such as the RLA.

Appellants again look to the legislative history of the Norris-LaGuardia Act for support for their contention that secondary boycotts in the railway industry were excluded from its coverage. Congressman Beck proposed an amendment which would have excluded labor disputes in the railroad industry from the proscription of Section 4 of the RLA.[34] In opposition, Congressman LaGuardia stated that this amendment was unnecessary because the RLA "provided a machinery . . . for settling labor disputes."[35] The amendment was then defeated. We cannot agree that this incidental exchange is sufficient to defeat the specific and encompassing exclusion of the Norris-LaGuardia Act. The exchange means only that the RLA establishes the procedures which must be followed prior to any strike activity taking place. Once they are exhausted, however, both parties, may resort to self-help, as they have done in this case. However, if they engage in self-help activities before exhaustion of the machinery established for dispute resolution, the action may be enjoined notwithstanding the Norris-LaGuardia Act. It is only because there is such machinery that the Supreme Court has carved out exceptions to the statute. *Brotherhood of R.R. Trainmen v. Chicago R. & I.R. Co.*, 353 U.S. 30, 77 S.Ct. 635, 1 L.Ed.2d 622 (1957) ("minor" disputes to be submitted to Adjustment Board for compulsory arbitration); *Shore Line R. Co. v. Transportation Union,*

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[34] 75 Cong. Rec. 5503 (Mar. 8, 1932).

[35] *Id.* at 5499.

396 U.S. 142, 90 S.Ct. 294, 24 L.Ed.2d 325 (1969) ("major" disputes). *Cf. Boys' Market, Inc. v. Retail Clerks Union Local 770*, 398 U.S. 235, 90 S.Ct. 1583, 26 L.Ed.2d 199 (1970) (injunction available to enforce contractual no strike clause if the grievance subject to arbitration). In this case, however, the parties have exhausted the pre-self-help dispute resolution procedures. They are thus free to engage in peaceful conduct to seek improvement of their respective positions.

Congress has not been reticent to prohibit secondary boycotts and to provide injunctive relief against them when it has considered it advisable.

In 1935 it enacted the National Labor Relations Act (Wagner Act), 49 Stat. 449, whereby the organizational rights of employees were generally recognized throughout the industrial and business sectors of the United States. The statute provided for unfair labor practices by employers, but contained no such prohibitions against labor organizations. Furthermore, the Act did not restrict secondary boycotts or picketing. *See Allen Brudely Co. v. Local 3, IBEW*, 325 U.S. 797, 65 S.Ct. 1533, 89 L.Ed. 1939 (1945); *NLRB v. Peter Cailler Kohler Swiss Chocolates Co.*, 130 F.2d 503 (2d Cir.1942). It was not until the Labor Management Relations Act of 1947 (Taft-Hartley Act), 61 Stat. 140, that Congress mentioned, and thereafter prohibited, secondary boycotts. *See* 29 U.S.C. 158(b)(4).[36] *See generally* Mills & Brown, *From the Wagner Act to Taft-Hartley* (1950); Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 Harv. L.Rev. 1 (1947). When Congress perceived various loop holes in that statute it proceeded to enact the Landum-

[36] Interestingly enough, during the debates for the enactment of the Taft-Hartley Act, Senator Taft was of the view that secondary boycotts by railroad employees were protected by the RLA. 93 Cong. Rec. 6498, 2 Legislative History of the Labor were Management Relations Act, 1947, p. 1571.

Griffin Act in 1959, 73 Stat. 525, 542, 545, and thus prohibited "hot cargo" clauses and similar conduct. 29 U.S. § 158(e).

It is significant not only that Congress has known how to specifically enact prohibitions against secondary activity, but also that Congress has not left to private enforcement the enjoining of secondary conduct. Such powers, when permitted, have *only* been granted to a designated federal agency, the National Labor Relations Board. *See* 29 U.S.C. § 160.

From all of the above we conclude that there are indeed some areas in the field of railroad labor relations that have been left unregulated. Whether this state of affairs should be allowed to remain is an affair of state, not a matter for the courts to correct. By now there should be no question that courts are not constitutionally empowered to enact legislation.

We should keep in mind what the Supreme Court stated in *Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 386, 89 S.Ct. 1109, 22 L.Ed.2d 344 (1968), a case in which the issues were closely related to the matters before us:

> No cosmic principles announce the existence of secondary conduct, condemn it as an evil, or delimit its boundaries. These tasks were first undertaken by judges, intermixing metaphysics with their notions of social and economic policy. And the common law of labor relation has created no concept more elusive than that of "secondary" conduct; it has drawn no lines more arbitrary, tenuous, and shifting than those separating primary from "secondary" activities.

Citations omitted.

Appellant should seek relief not before this Court, but before Congress.

III

Lastly, appellants argue that the Norris-LaGuardia Act must be read in context with the Interstate Commerce Act, 49 U.S.C. § 11101 *et seq.*, which establishes a national policy in favor of providing uninterrupted rail transportation. This policy, appellants claim, as expressed in 49 U.S.C. §§ 11101(a) ("A common carrier . . . shall provide the transportation or service on reasonable request") and 10741 (prohibitions against discrimination by common carrier), permits the issuance of an injunction to prevent secondary picketing. To say the least, this argument is far-fetched.

It is clear from reading the Interstate Commerce Act, that it is principally a *carrier*-regulatory statute. *See* 49 U.S.C. §§ 10101, 10101a. It is not a labor law, nor is it intended to control in any manner the conduct which is permissible in a labor dispute. Although a common carrier cannot under the statute refuse to handle cargo or provide transportation to passengers for discriminatory reasons,[37] there is nothing in the statute that imposes obligations on the carrier, if prevented by any *force majeure* from meeting its statutory duties. Picketing of the nature here in question may well be *force majeure.*[38] If appellants are entitled to injunctive relief against secondary picketing because it interferes with a carrier's duties under the Interstate Commerce Act, they are equally entitled to such relief against primary picketing, which is just as disruptive of interstate commerce. Obviously, such an argument cannot be seriously made.

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[37] Just as it could not at common law. *See American Trucking Associations, Inc. v. Atchison, Topeka & Santa Fe Railway Co.*, 387 U.S. 397, 406, 87 S.Ct. 1608, 1613, 18 L.Ed.2d 847 (1967).

[38] *See Mishara Constr. Co. v. Transit-Mixed Concrete Corp.*, 365 Mass. 122, 310 N.E.2d 363 (Mass. 1974) (recognizing that when labor dispute is unexpected and occurrence of the dispute presents unusual difficulty "the excuse of impracticability may well be applicable").

We thus agree with our brethern of the Seventh Circuit that the Interstate Commerce Act does not provide leave to ignore the proscriptions of the Norris-LaGuardia Act. *Burlington Northern R. Co., supra*, 793 F.2d at 800. *See also Order of Railroad Telegraphics v. Chicago & N.W. Ry.*, 362 U.S. 330, 339, 80 S.Ct. 761, 766, 4 L.Ed. 2d 774 (1960); *Milk Wagon Drivers' Union v. Lake Valley Co.*, 311 U.S. 91, 103, 61 S.Ct. 122, 128, 85 L.Ed. 63 (1940).

The order of the district court denying injunctive relief is *affirmed.*

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

Civil No. 86-0084-P

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES,

Plaintiff

v.

GUILFORD TRANSPORTATION INDUSTRIES, INC., ET AL.,

Defendants

[Filed April 2, 1986]

CARTER, District Judge

ORDER DENYING DEFENDANT DELAWARE AND HUDSON'S MOTION FOR A PRELIMINARY INJUNCTION [1]

Currently before the Court is the motion of Defendant and Counterclaimant Delaware and Hudson Railway (D&H) to enjoin Plaintiff, and all persons acting in concert with it, from picketing the premises of the D&H.

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[1] Defendant actually moved for a temporary restraining order. Notice was given to the opposing party, however, and both sides briefed and argued the issue. With the agreement of counsel, the Court decided to treat the motion as one for a preliminary injunction under *Stanton v. Brunswick School Department*, 577 F. Supp. 1560, 1562 (D. Me. 1984).

In order for Defendant to prevail on its claim for such relief, the Court must find (1) that the Defendant will suffer irreparable injury if the injunction is not granted; (2) that such injury outweighs any harm which the granting of injunctive relief would inflict on the Plaintiff; (3) that Defendant has exhibited a likelihood of success on the merits; and (4) that the public interest will not be adversely affected by the granting of the injunction. *Stanton v. Brunswick School Department*, 577 F. Supp. 1560, 1566-67 (D. Me. 1984). After reviewing the written submissions and considering the oral presentations of both parties, the Court finds that Defendant has failed to show a likelihood of success on the merits.

Citing *Ashley, Drew and Northern Ry. v. UTU*, 625 F.2d 1357 (8th Cir. 1980), and *Brotherhood of Railroad Trainmen v. Atlantic Coast Line R.R.*, 362 F.2d 649 (5th Cir. 1966), Defendant argues that the Court should issue an injunction against the picketing occurring in this case because D&H is not involved in a labor dispute with Plaintiff nor is it substantially aligned with the Maine Central Railroad, against whom the Union is striking. The Court is persuaded, however, that the economic self-interest/substantial alignment tests enunciated in the cases cited by Defendant do not survive *Jacksonville Bulk Terminals v. ILA*, 457 U.S. 702, 713 (1982). After *Jacksonville Bulk Terminals*, it appears that all that is required for protections of the Norris-LaGuardia Act to apply is that there be a labor dispute and that the union continue to act as a labor organization. *Id.* at 714; *see also Smith's Management Corp. v. IBEW*, 737 F.2d 788 (9th Cir. 1984). It is clear that a labor dispute between the Plaintiff and the Maine Central underlies the picketing sought to be enjoined here, and there is no doubt in the Court's mind that the Union is acting as a labor organization trying to force resolution of that dispute by picketing D&H. Having determined these basic issues, the Court will not become embroiled in the very scrutiny

of union objectives which Congress intended to prevent by passing the Norris-LaGuardia Act. *Id.* at 719. Whether secondary picketing is to be prohibited in certain circumstances under the Railway Labor Act is a question of legislative policy, properly left to Congress.

Accordingly, it is *ORDERED* that Defendant D&H's Motion for a Preliminary Injunction be, and it is hereby, *DENIED.*

/s/ Gene Carter
GENE CARTER
United States District Judge

Dated at Portland, this 2nd day of April, 1986.

RAILWAY LABOR ACT, 45 U.S.C. § 151 ET SEQ.

§ 151a. *General purposes.*

The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged herein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

§ 152. *General duties—Duty of carriers and employees to settle disputes*

First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Consideration of disputes by representatives

Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference

between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

* * * *

Conference of representatives; time; place; private agreements

Sixth. In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: *Provided*, (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice; *And provided further*, That nothing in this chapter shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

Change in pay, rules, or working conditions contrary to agreement or to section 156 forbidden

Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title.

* * * *

§ 153. *National Railroad Adjustment Board—Establishment; composition; powers and duties; divisions; hearings and awards; judicial review*

First.

* * * *

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

* * * *

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute. In case a dispute arises involving an interpretation of the award, the division of the Board upon request of either party shall interpret the award in the light of the dispute.

§ 155. *Functions of Mediation Board—Disputes within jurisdiction of Mediation Board*

First. The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 160 of this title) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this chapter.

If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 160 of this title, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

* * * *

§ 156. *Procedure in changing rates of pay, rules, and working conditions*

Carriers and representatives of the employees shall give at least thirty days' written notice of an

intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

§ 157. *Arbitration—Submission of controversy to arbitration*

First. Whenever a controversy shall arise between a carrier or carriers and its or their employees which is not settled either in conference between representatives of the parties or by the appropriate adjustment board or through mediation, in the manner provided in sections 151-156 of this title, such controversy may, by agreement of the parties to such controversy, be submitted to the arbitration of a board of three (or, if the parties to the controversy so stipulate, of six) persons: *Provided, however,* That the failure or refusal of either party to submit a controversy to arbitration shall not be construed as a violation of any legal obligation imposed upon such a party by the terms of this chapter or otherwise.

* * * *

§ 160. *Emergency Board*

If a dispute between a carrier and its employees be not adjusted under the foregoing provisions of this chapter and should, in the judgment of the Mediation Board, threaten substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President, who may thereupon, in his discretion, create a board to investigate and report respecting such dispute. Such board shall be composed of such number of persons as to the President may seem desirable: *Provided, however,* That no member appointed shall be pecuniarily or otherwise interested in any organization of employees or any carrier. The compensation of the members of any such board shall be fixed by the President. Such board shall be created separately in each instance and it shall investigate promptly the facts as to the dispute and make a report thereon to the President within thirty days from the date of its creation.

There is authorized to be appropriated such sums as may be necessary for the expenses of such board, including the compensation and the necessary traveling expenses and expenses actually incurred for subsistence, of the members of the board. All expenditures of the board shall be allowed and paid on the presentation of itemized vouchers therefor approved by the chairman.

After the creation of such board and for thirty days after such board has made its report to the President, no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose.

NORRIS-LAGUARDIA ACT, 29 U.S.C. § 101 ET SEQ.

§ 101. *Issuance of restraining orders and injunctions; limitation; public policy*

No court of the United States, as defined in this chapter, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter.

§ 104. *Enumeration of specific acts not subject to restraining orders or injunctions*

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103 of this title;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any

action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title.

§ 113. *Definitions of terms and words used in chapter*

When used in this chapter, and for the purposes of this chapter—

(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case in-

volves any conflicting or competing interests in a "labor dispute" (as defined in this section) of "persons participating or interested" therein (as defined in this section).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

(d) The term "court of the United States" means any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the courts of the District of Columbia.

NATIONAL LABOR RELATIONS ACT, 45 U.S.C. § 151 ET SEQ.

§ 158. *Unfair Labor Practices*

* * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * *

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

(A) forcing or requiring any employer or self-employer person to join any labor or employer organization or to enter into any agreement which is prohibited by section 8(e) [subsec. (e) of this section];

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act: Provided, further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution.

INTERSTATE COMMERCE ACT, 49 U.S.C. § 10101 ET SEQ.

§ 11101. *Providing Transportation and Service*

(a) A common carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title shall provide the transportation or service on reasonable request. In addition, a motor common carrier shall provide safe and adequate service, equipment, and facilities. A rail carrier shall not be found to have violated this section because it fulfills its commitments under contracts approved under section 10713 of this title before responding to reasonable requests for service.

Supreme Court, U.S.
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No. 86-1220

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

DELAWARE & HUDSON RAILWAY COMPANY,
Petitioner,

v.

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF FOR RESPONDENT IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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Respondent Brotherhood of Maintenance of Way Employes [hereinafter, "BMWE"] respectfully submits that this Court should defer consideration of the petition for a writ of certiorari in this case until after this Court enters its ruling in Sup. Ct. No. 86-39, *Burlington Northern R.R. v. BMWE*.

COUNTERSTATEMENT OF THE CASE

While respondent BMWE disagrees with petitioner Delaware & Hudson Railway Company's [hereinafter, "D&H"] recitation of the facts in this case insofar as petitioner alleges that it is in fact separate and distinct from its related corporations, the Maine Central Railroad and Portland Terminal, petitioner's alignment with those carriers is irrelevant to the reasoning given by the First Circuit for its decision in this case. Conse-

quently, respondent BMWE will not address this factual dispute at this time.

ARGUMENT

Respondent BMWE agrees with petitioner D&H's implicit suggestion that the proper resolution of the issues presented by this petition will be controlled by whatever decision this Court enters in Sup. Ct. No. 86-39, *Burlington Northern R.R. v. BMWE*, which was argued before this Court on February 23, 1987. Consequently, respondent BMWE respectfully submits that this Court should defer consideration of the petition for a writ of certiorari in this case until after the ruling in *Burlington Northern* is issued. If, as respondent BMWE asserts should occur, this Court affirms the decision by the Seventh Circuit in that case, respondent submits that the petition for a writ of certiorari in this case should be denied. However, if this Court reverses the Seventh Circuit's decision, respondent respectfully requests that it then be granted an opportunity to file a supplemental brief concerning the proper disposition of this case in light of that ruling.

CONCLUSION

Respondent BMWE respectfully submits that the consideration of this case should be deferred pending resolution of Sup. Ct. No. 86-39, *Burlington Northern R.R. v. BMWE*.

Respectfully submitted,

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